IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

DR. ERWIN D. JACKSON,

Plaintiff,

vs. CASE NO. 2019-CA-03

CITY OF TALLAHASSEE, et al.,

Defendants.
_____/

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
AND SUPPORTING MEMORANDUM OF LAW

Come now Defendants, the City of Tallahassee, John E. Dailey, Jeremy Matlow, Curtis Richardson, Dianne Williams-Cox and Elaine Bryant, named in their official capacities, and submit this motion for summary judgment.

I. Facts[1]

Plaintiff has brought this action alleging that the submission of lists of names, by each member of the Tallahassee City Commission, should have been conducted in a public meeting and was therefore in violation of the Sunshine Law.

In this case, each member of the City Commission individually submitted a list of names of persons to be considered to fill a vacancy on the Commission. The submission of each list of names was an individual act by each commissioner, and not the collegial act of the City Commission itself.

[1] The parties have stipulated to a set of facts and exhibits, filed separately, which are incorporated by reference. A summary of those stipulated facts is set out herein.

There is no allegation that the commissioners communicated or held a non-public meeting. Plaintiff's argument is that merely submitting the names of candidates should have been done at a public meeting.

The facts are undisputed that on December 31, 2018, the City Commission held a public meeting and appointed Dr. Elaine Bryant to fill a temporary vacancy on the City Commission. The meeting was publicized, well-attended by the public and lasted for more than three hours. There was more than an hour of public comment and 30 public speakers. At the meeting, nine candidates (seeking to fill the vacancy) made presentations and responded to questions from commissioners.

The vacancy arose when Governor Rick Scott suspended Commissioner Scott Maddox from the City Commission by Executive Order 18-365 issued on December 12, 2018. Upon the occurrence of the vacancy, pursuant to Section 14 of the Tallahassee City Charter, the remaining members of the City Commission were entitled to make an appointment to fill the vacancy.

On the day the vacancy occurred, December 12, 2018, the City posted a notice inviting interested persons to apply to fill the vacancy. The City also published notice in the newspaper inviting interested persons to submit applications. The City received applications through December 22, 2018 and 93 applications were submitted by City residents.

After the application period closed, each member of the City Commission submitted a list of three candidates to be considered to fill the vacancy. The commissioners followed a selection process set out in City Commission Policy 144 which has been in effect since 2009. Under the tabulation procedure set out in the policy, the City Treasurer-Clerk's Office assigned points to the names. After the tabulation, all of the names submitted were placed on a published Commission agenda and the candidates were considered at the December 31, 2018 meeting.

At the December 31, 2018 public meeting, after deliberation and discussion, Dr. Elaine Bryant was appointed by the City Commission to serve in City Commission Seat 1.

II. Summary Judgment Standard

Summary judgment is proper if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. See Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000). "The judgment sought shall be rendered forthwith if the pleadings and summary judgment evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fla. R. Civ. P. 1.510(c). In reviewing a motion for summary judgment, the court considers "affidavits, answers to interrogatories, admissions, depositions, and other materials as would be admissible in evidence" which are submitted by the parties. Id. In this case, the parties have stipulated to a set of facts which form the basis for this motion.

III. Submission of Names Complied with Sunshine Law

A. Sunshine Law Provisions

Section 286.011(1) of the Florida Statutes (2018) states:

> All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, including meetings with or attended by any person elected to such board or commission, but who has not yet taken office, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting. The board or commission must provide reasonable notice of all such meetings.

Id.

Article 1, Section 24(b) of the Florida Constitution states:

> All meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public . . . . .

Id.

B. Sunshine Law Applies to Collegial Action

Section 286.011(1) requires "official acts" of "any board of commission" to be conducted at a public meeting. Likewise, Article 1, Section 24(b) of the Florida Constitution requires that "meetings of any collegial public body" of local government "at which official acts are to be taken or at which public business of such body is to be transacted or discussed" be conducted in public.

The cases construing the Sunshine Law have therefore focused on the decision-making or official acts of the collegial body. See, e.g., Wood v. Marston, 442 So. 2d 934 (Fla. 1983) (advisory committee was part of decision-making function and therefore subject to Sunshine Law); Bennett v. Warden, 333 So. 2d 97 (Fla. 2d DCA 1976) (meetings between college president and employees not subject to Sunshine Law where no collective decision-making).

C. Individual vs. Collegial Action

Collegial or collective decision-making must be distinguished from the unilateral acts of a single person. Where a government official acts unilaterally, separate and apart from a collegial body, a public meeting is not required.

The following cases all hold that where a single individual possesses unilateral decision-making authority, a public meeting is not required.[2] See, e.g., Cape Publications, Inc. v. City of Palm Bay, 473 So. 2d 222 (Fla. 5th DCA 1985) (city manager had sole decision-making authority in selection of police chief); Molina v. City of Miami, 837 So. 2d 462 (Fla. 3d DCA 2002) (police chief decision-maker in review of discharge of firearm); McDougall v. Culver, 3 So. 3d 391 (Fla. 2d DCA 2009) (sheriff decision-maker in internal affairs review); Jordan v. Jenne, 938 So. 2d 526 (Fla. 4th DCA 2006) (sheriff was decision-maker in disciplinary matter); Sunrise v. News and Sun-Sentinel Co., 542 So. 2d 1354 (Fla. 4th DCA 1989) (mayor was decision-maker in employee disciplinary matter).

A series of opinions from the Florida Attorney General recognizes that the unilateral act of a single government official does not require a public meeting although the official serves as a member of a board or commission. This is true even though the topic or issue is subsequently presented to a board or commission.

The Attorney General has recognized that a city commissioner may prepare and circulate a report to other members of the city commission outside of a public meeting. See Op. Att'y Gen. Fla. 89-23 (1989), 1989 WL 431616. "The use of a written report by one commissioner to inform other commissioners of a subject which will be discussed at a public meeting does not violate Florida's Government in the Sunshine Law if prior to the public meeting, there is no interaction related to the report among the commissioners." Id.; see also Op. Att'y Gen. Fla. Informal (May 21, 2009), 2009 WL 3260082 (same).

Likewise, the Attorney General has recognized that a school board member could send a memorandum to the other board members stating a position and encouraging support for the

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[2] The nature of the individual decision-making is not altered despite the presence of others in the process, or the assistance of staff.

position. See Op. Att'y Gen. Fla. 96-35 (1996), 1996 WL 267353. The Attorney General opined: "[I]t is my opinion that if a school board member writes a memorandum to provide information or to make a recommendation to other school board members on a particular subject, there is no violation of section 286.011." Id.

A city commissioner may prepare and distribute an individual position statement prior to a public meeting where there is a vote on the issue. See Op. Att'y Gen. Fla. 2001-21 (2001), 2001 WL 276607. Further, a city commissioner may publish his anticipated vote on an issue on an internet blog or in a newspaper before the public meeting. See Op. Att'y Gen. Fla. Informal (Jan. 22, 2009), 2009 WL 3260084.

The lists of names submitted by each commissioner in this case were akin to the memoranda or proposals as contemplated by the Attorney General in the opinions referenced above and did not trigger any requirement for a public meeting.

D. Submission of Names Was Individual Act

In this case, individual City Commissioners submitted their list of proposed candidates. The submission of each list was an individual act. It was not the act of the entire City Commission. In fact, the City Commission was free to reject every candidate submitted by any commissioner.

There are a number of other instances where an individual commissioner may unilaterally take a preliminary step in presenting a matter to the full City Commission. For example, a commissioner could prepare a resolution or draft an ordinance which is later presented to the full City Commission for consideration. A commissioner may nominate an individual to serve on one of many citizen committees. A commissioner may propose a regulation, e.g., closing hours

for bars or restaurants, or an initiative, e.g., economic development on south side of town. The submission of the proposal is the commissioner's act, not the act of the collegial body. When ultimately presented at a public meeting, the City Commission may outright reject, modify, amend or adopt the proposal.

In Nat'l Council on Comp. Ins. v. Fee, 219 So. 3d 172 (Fla. 1st DCA 2017), the court distinguished between individual and collective action. In the case, it was alleged that a rate proposal prepared by an individual was the subject of collective action. The court rejected this argument and explained:

> Fee asserts that Rosen, in his individual capacity, acted in place of the rate-determination committee contemplated by section 627.091(6). This argument ignores the plain language of the statute and the ordinary meaning of the terms within it. See McKenzie Check Advance of Fla., LLC v. Betts, 928 So. 2d 1204, 1208 (Fla. 2006) (explaining that statutory construction starts with an examination of the plain language of the statute); State v. Bodden, 877 So. 2d 680, 685 (Fla. 2004) (observing that it is assumed that the legislature knows the ordinary meaning of words when it enacts a statute). The statute applies only to meetings of a rating organization committee where workers' compensation insurance rates are discussed and determined. A "committee" has been defined as a "subordinate group," not a single person. See Committee, Black's Law Dictionary (10th ed. 2014). Moreover, the use of the term "meets" indicates that the statute is designed to apply to a group of people, not a single individual. The multi-person concept of the term "committee" further finds support in well-established precedent construing the Sunshine Law. See Sarasota Citizens for Responsible Gov't v. City of Sarasota, 48 So. 3d 755, 764 (Fla. 2010) (explaining that Sunshine Law protections extend to formal and informal meetings only when two or more members of the same board or commission meet to deal with a matter on which action will be taken in the future); Office of the Attorney General, Government–In–The–Sunshine Manual, at 18 (2016 ed.) (observing that the Sunshine Law does not "ordinarily apply to an individual member of a public board or commission or to public officials who are not board or commission members."). Thus, under the plain and ordinary meaning of the terms "committee" and "meet," Rosen, in his individual capacity, does not act or "meet" as the statutory rate-determination committee contemplated by section 627.091(6).

Id. at 178-79. In determining that the individual action could not constitute the act of a committee, the court held that the individual action was not subject to the Sunshine Law. Id.

The express provisions of the Sunshine Law are clear that there must be some "official act" of the "collegial public body" or a "board or commission" to require a public meeting. The unilateral act of an individual official does not satisfy this threshold requirement.

The Florida Supreme Court has explained: "Nothing in the Sunshine Law requires each commissioner to do his or her thinking and studying in public. The law is satisfied if the commissioners reached a mutual decision on rate matters when they met together in public for their 'formal action.'" Occidental Chem. Co. v. Mayo, 351 So. 2d 336, 342 (Fla. 1977).

In this instance, each commissioner's submission of a list of candidates was his or her own proposal and not that of the collegial body. Because the submission of each list was not the act of the collegial body, there was no requirement that each list be submitted during a public meeting.

E. Collegial Action Distinguished

Because the submission of each list of candidates was an individual act, the facts in this case must be distinguished from the line of cases addressing the decision-making process by a panel or committee.

Plaintiff's principal case involved a selection committee where the members were acting collectively. Plaintiff relies on Leach-Wells v. City of Bradenton, 734 So. 2d 1168 (Fla. 2d DCA 1999). In Leach-Wells, a selection committee was charged with reviewing proposals from prospective vendors and recommending three contractors. Id. at 1169. Of particular note, the recommendations were to be the act of the committee as a whole. Each committee member submitted a ranking from which the committee's recommendation would be formed. Id. After the committee members submitted their rankings, they were compared. Each committee member

had submitted identical rankings. The city clerk (who was a member of the committee) therefore decided that the action of the committee could be determined without a public meeting. Id. The court held that where the committee took formal action outside of a meeting, there was a Sunshine violation. Id. at 1171.

Because Leach-Wells involved the formal action of a committee, the case is not applicable to the facts of the instant case. The submissions of the individual commissioners are readily distinguished from the collegial action of a committee.

Likewise, other authority cited by Plaintiff involving collective or collegial decision-making must be distinguished. Cf., Silver Express Company v. District Board of Lower Tribunal Trustees of Miami–Dade Community College, 691 So. 2d 1099 (Fla. 3d DCA 1997) (Sunshine violation where procurement committee took action outside public meeting); Wood v. Marston, 442 So. 2d 934 (Fla. 1983) (Sunshine violation where advisory committee took action outside public meeting); Dascott v. Palm Beach County, 877 So. 2d 8 (Fla. 4th DCA 2004) (Sunshine violation where disciplinary committee took action outside public meeting).

F. Conclusion - Purported Sunshine Violation

Based on the foregoing, this Court should enter summary judgment declaring that individual commissioner submission of candidates to be considered by the full City Commission complied with the Sunshine Law.

IV. Public Meeting Cured Any Purported Sunshine Violations

Even if there was a technical violation of the Sunshine Law by the City Commission, the violation was cured at the public meeting held on December 31, 2018. The Florida Supreme

Court in Tolar v. School Board of Liberty County, 398 So. 2d 427 (Fla. 1981) explained that not all violations of the Sunshine Law are incurable or require that the final action taken by the public body be voided. In Tolar, the county school superintendent-elect and members of the school board met and discussed potential reorganization and personnel matters. Subsequently at a public open meeting, the school board voted to abolish the position of director of administration and to transfer plaintiff to an elementary school. While acknowledging that the private discussions between the superintendent and board members were a violation of the Sunshine Law, the court found that the violation was cured by the "independent, final action in the sunshine" taken by the board at the open meeting and therefore, the final action taken by the board would not be voided. Id. at 429.

The reasoning in Tolar has been applied in several cases to uphold the final action of a public body. In Finch v. Seminole County School Board, 995 So. 2d 1068, 1071 (Fla. 5th DCA 2008), school board members took a bus tour together "to explore the effect rezoning would have on a number of different communities and bus transportation routes." The bus tour was not open to the public and no notice was published in violation of the Sunshine Law. In subsequent public meetings, the rezoning plan was discussed and eventually adopted. In upholding the rezoning plan, the court stated:

> [P]ublic final action of a board or committee subject to the Sunshine Law will not always be void and incurable simply because the topic of the public action was previously discussed at a private meeting. Indeed, the Sunshine Law can be satisfied if the board or commission reaches a mutual decision on the pertinent issue when they subsequently meet together in public for their "formal action." See Occidental Chemical Co. v. Mayo, 351 So. 2d 336 (Fla. 1977). That is to say, some Sunshine Law violations may be cured by later actions of the decision maker.

Id. at 1073; see also Sarasota Citizens for Responsible Government v. City of Sarasota, 48 So. 3d 755 (Fla. 2010) (violation of Sunshine Law cured by subsequent independent final action by county commission).

In this case, the City Commission employed a transparent process throughout the short time period required to fill the vacancy. The City published notice both online and in the newspaper that it was accepting applications to fill the vacancy. See Exhibits 4 and 5 of Stipulated Facts. It posted each application received on its website, and posted notice that there would be a public meeting on December 31, 2018 with presentations by nine candidates. Then, at the meeting on December 31, 2018, all the commissioners spoke about reviewing the numerous applications and spoke in favor of their nominee for the position. Before making their nominations, Commissioner Matlow explained his process for picking his top three for the short list of candidates and Commissioner Williams-Cox explained that she met with any candidate who asked to see her. The meeting lasted three hours and thirty members of the public spoke during the public comment section.

This is not a case where the commissioners met in secret or delegated their decision-making authority to another board or committee as in Leach-Wells v. City of Bradenton, 734 So. 2d 1168 (Fla. 2d DCA 1999). Here the commissioners acted individually and then came together for a public meeting at which the final formal action of filling the vacaney occurred. Under these circumstances, the meeting held on December 31, 2018, cured any technical violation of the Sunshine Law that may have occurred.

V. Creation of New Vacancy Would Run from Date of Judgment

If this Court finds the City violated the Sunshine Law and declares the appointment of Commissioner Bryant void *ab initio*, under Florida law this would create a new vacancy as of the date of the final judgment. "A vacancy in office shall occur . . . [u]pon the rendition of a final judgment of a circuit court of this state declaring void the election or appointment of the incumbent to office." § 114.01(1)(*l*), Fla. Stat. (2018). Accordingly, upon rendition of any judgment by this Court declaring void the appointment of Commissioner Bryant to the office of City Commission, a new vacancy will occur in the City Commission which the City must proceed to fill in compliance with Section 14 of the City Charter.

Plaintiff's contention that a vacancy has existed for more than twenty days and that the Governor is to fill the vacancy according to Section 14 of the City Charter is incorrect as a matter of law and must be rejected.

VI. Monetary Claims Fail

Plaintiff has sought a declaration that, in the event the appointment of Comm. Bryant[3] is deemed void, the City recoup any salary, benefits or other compensation paid to her. In any event, Plaintiff is not entitled to the relief requested.

The court in Dascott v. Palm Beach County, 988 So. 2d 47 (Fla. 4th DCA 2008) explained:

> [T]he Sunshine Act does not expressly mention or imply by its terms that monetary damages are available as a remedy. The only remedies available pursuant to the Sunshine Act are a declaration of the wrongful action as void and reasonable attorney's fees. See § 286.011(1)-(4) Fla. Stat. In following Johnson [v. Beary, 665 So. 2d 334, 336 (Fla. 5th DCA 1995)], we construe the Sunshine Act to limit the remedies to those specifically enumerated therein. Consequently,

[3] Comm. Bryant is named in her official capacity and therefore not subject to any claim in her personal capacity.

> Ms. Dascott may not recover the equitable relief of back pay because money damages are not a remedy provided for by the Act. See § 286.011 Fla. Stat.

Id.

VII. Conclusion

For the reasons stated above, Defendants' motion for summary judgment is due to be granted and the Court should declare that the submission of the candidate names complied with the Sunshine Law, or alternatively that the December 31, 2018 public meeting cured any violation of the Sunshine Law. Further, in the event the Court finds a Sunshine violation and declares a vacancy in City Commission Seat 1, such vacancy should commence as of the date of the entry of judgment. Finally, in any event, the Court should reject Plaintiff's claims concerning recoupment of any monetary benefits to Comm. Bryant.

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of January, 2019, a copy of the foregoing pleading was served on the following:

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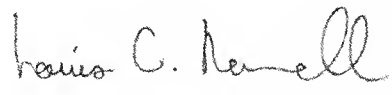

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